No. 76-1818

In the Supreme Court of the United States

OCTOBER TERM, 1977

RICHARD HAMILTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 553 F. 2d 63.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1977. The petition for a writ of certiorari was filed on June 20, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a collateral attack on his conviction, petitioner was automatically entitled to withdraw his guilty plea because the district court did not advise him of a mandatory special parole term that resulted in a

total sentence no greater than the term of imprisonment the court told petitioner he might receive.

STATEMENT

On October 18, 1972, petitioner pleaded guilty in the United States District Court for the District of Kansas to conspiracy to import marijuana, in violation of 21 U.S.C. 960 and 963. Although the district court told petitioner that as a result of his plea he would be liable to a maximum term of imprisonment of five years and a $15,000 fine, it failed to advise that upon conviction he would also be subject to a mandatory special parole term under 21 U.S.C. 960(b).[1] Thereafter, on December 11, 1972, petitioner was sentenced to three years' imprisonment, with parole eligibility to be determined pursuant to 18 U.S.C. 4208(a)(2).

On April 5, 1973, after petitioner had begun serving his term, the district court, acting on its own motion on the basis of advice from the Bureau of Prisons, amended the sentence by adding a three year special parole term pursuant to 21 U.S.C. 841(b)(1)(A). Petitioner then moved for

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[1]At the October 18 hearing, the following colloquy occurred (Tr. 35):

> THE COURT: * * * I talked to you about the range of penalties to little or no degree, except to mention the Youth Correction Act. In the petition that you have they have shown you that the penalties for a plea of guilty, unless you are subject or have the right to be proceeded against under the Youth Correction Act, are 5 years and a fine of $15,000, or both, and that you could * * *be sentenced under the Youth Correction Act which might require you to spend as long as 6 years in a penal institution even though the maximum term of confinement set forth by the statute is less than 6 years.
>
> Mr. Hamilton, do you understand this?
>
> MR. HAMILTON: Yes sir.

correction of his sentence under Rule 35, Fed. R. Crim. P. on the ground that he had not been prosecuted under Section 841, but under Section 960, and that therefore a "Special Parole Term of Two Years pursuant to 21 U.S.C. sec. 960 would be proper" (Pet. App. A16). On September 20, 1973, the district court granted petitioner's motion and reduced petitioner's sentence, as previously amended, to provide for a special parole term of two years under 21 U.S.C. 960. The sentence ultimately imposed was thus three years' imprisonment and two years' special parole. Petitioner did not appeal.

On January 20, 1976, petitioner filed the instant motion pursuant to 28 U.S.C. 2255, alleging that he was entitled to have his conviction vacated because the district court had not informed him of the existence of the mandatory special parole term when it accepted his guilty plea. The district court denied his motion without a hearing. The court of appeals affirmed (Pet. App. A), holding that the district court's technical noncompliance with the requirements of Rule 11, Fed. R. Crim. P., when it accepted the guilty plea did not entitle petitioner to collateral relief because he had not shown any prejudice (Pet. App. A).

ARGUMENT

Relying on this Court's decision in *McCarthy* v. *United States*, 394 U.S. 459, petitioner contends that the sentencing court violated Rule 11(c), Fed. R. Crim. P. by failing to advise him of the mandatory special parole term when it accepted his guilty plea, and that he was therefore automatically entitled to have his conviction vacated.[2] We disagree. *McCarthy* involved a direct appeal from a conviction entered after a seriously defective guilty plea proceeding in which the district court, in

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[2]Similar claims are now before this Court in *Scharf* v. *United States*, No. 76-1611, and *Eckman* v. *United States*, No. 76-1695.

gross disregard of Rule 11, had not even ascertained whether the defendant understood the nature of the charges against him. In reversing the conviction, the Court held that "a defendant whose plea has been accepted in violation of Rule 11 should be afforded the opportunity to plead anew." 394 U.S. at 472. While the rule of *McCarthy* might be applicable if petitioner had raised the technical violation of Rule 11 on direct appeal or by a timely motion to withdraw the plea, it is not applicable to a collateral challenge where there has been no showing of prejudice.

As the Court recently noted in *Davis* v. *United States*, 417 U.S. 333, 346, quoting from *Hill* v. *United States*, 368 U.S. 424, 428-429, "collateral relief is not available when all that is shown is a failure to comply with the formal requirements of a rule of criminal procedure in the absence of any indication that the defendant was prejudiced by the asserted technical error." Absent a mistake of constitutional or jurisdictional dimensions, "the appropriate inquiry [is] whether the claimed error of law was 'a fundamental defect which inherently results in a complete miscarriage of justice' * * *" (*ibid.*). See also *Stone* v. *Powell*, 428 U.S. 465, 477 n. 10; *Del Vecchio* v. *United States*, 556 F. 2d 106 (C.A. 2); *Johnson* v. *United States*, 542 F. 2d 941 (C.A. 5), certiorari denied, No. 76-5893, March 21, 1977; *McRae* v. *United States*, 540 F. 2d 943 (C.A. 8); *Bell* v. *United States*, 521 F. 2d 713 (C.A. 4), certiorari denied, 424 U.S. 918; *Bachner* v. *United States*, 517 F. 2d 589 (C.A. 7).

That petitioner suffered neither manifest injustice nor prejudice is demonstrated by the record in this case. As the court of appeals correctly found (Pet. App. A21):

> * * * The trial court explained the petitioner's rights at length and was assured both by the petitioner and his lawyer that the guilty plea was voluntary. The ultimate sentence was three years and two years parole. The total period did not exceed the term [o]f imprisonment which the Court told petitioner he might receive for his offense. After he knew of the mandatory parole provisions, petitioner did not seek vacation of the guilty plea but rather sought modification of the sentence under Rule 35 to provide for a two-year parole. He did not file the pending sec. 2255 motion until three years later. We are convinced that the petitioner voluntarily pleaded guilty and was not prejudiced by the technical rule violation.

Although, as petitioner notes (Pet. 7-11), several circuits have relied upon *McCarthy* to grant Section 2255 relief without a showing of prejudice to defendants whose guilty pleas were accepted in technical noncompliance with Rule 11 (see *United States* v. *Harris*, 534 F. 2d 141 (C.A. 9); *United States* v. *Yazbeck*, 524 F. 2d 641 (C.A. 1); *United States* v. *Wolak*, 510 F. 2d 164 (C.A. 6); *Roberts* v. *United States*, 491 F. 2d 1236 (C.A. 3)), none of these courts analyzed the defendant's claim in light of the distinction between direct and collateral attack upon a conviction. The conflict among the circuits may reasonably be expected to disappear as this issue continues to be litigated in the lower courts in light of the standard for granting collateral relief outlined in *Davis*. Indeed, within the past year two courts of appeals have reconsidered their previous rulings and have adopted the view we advocate. Compare *Del Vecchio* v. *United States, supra*, with *Ferguson* v. *United States*, 513 F. 2d 1011 (C.A. 2), and *McRae* v. *United States, supra*, with *United States* v. *Richardson*, 483 F. 2d 516 (C.A. 8).[3]

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[3]The Sixth Circuit, in *Timmreck* v. *United States*, 423 F. Supp. 537 (E.D. Mich.), notice of appeal filed December 28, 1976, is

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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presently considering whether to reverse the position it previously took in *Wolak*.